



## HOBBY LOBBY AS A LAND USE CASE: CHARTING FOR-PROFIT RLUIPA CLAIMS

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### INTRODUCTION

Depending on whom you ask, *Burwell v. Hobby Lobby Stores, Inc.*,<sup>1</sup> is either a landmark case or a “bore.”<sup>2</sup> This difference largely comes down to framing. If seen as a decision mostly construing the definition of “person” under the Religious Freedom Restoration Act of 1993 (“RFRA”),<sup>3</sup> it might not appear all that remarkable. The

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<sup>1</sup> 134 S. Ct. 2751 (2014).

<sup>2</sup> See, e.g., Eric Posner, *Religious People Have Rights, Too—And That’s Why Hobby Lobby Threatens Liberals*, SLATE (Dec. 8, 2015, 12:45 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2014/scotus\\_roundup/supreme\\_court\\_2014\\_hobby\\_lobby\\_is\\_a\\_bore.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_hobby_lobby_is_a_bore.html).

<sup>3</sup> 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* (1993). As summarized by the Court, RFRA provides that “‘Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.’ § 2000bb-1(a).<sup>2</sup> If the Government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government ‘demonstrates that application of the burden to the person—(1) is in

legal fiction of treating corporations as persons is familiar.<sup>4</sup> Going further, and establishing that RFRA carries this fiction to closely-held companies whose ownership have religious qualms over certain federal regulations—such as a mandate to expand contraception coverage in their employee benefits—is also not too removed from earlier cases that have allowed similar claims from non-profits.<sup>5</sup> However, if regarded more as a decision that acknowledges that “religious exercise” and “commerce” can be said in the same breath, it feels far more noteworthy, perhaps even radical when one considers the parade of horrors given by some commentators, such as the specter of corporations having “Road to Damascus” conversions to escape regulation.<sup>6</sup>

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furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’ § 2000bb-1(b).” *Hobby Lobby*, 134 S. Ct. at 2761.

<sup>4</sup> *See, e.g.*, *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”); *FCC v. AT & T Inc.*, 562 U.S. 397, 404-05 (2011) (“We have no doubt that ‘person,’ in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear. 1 U.S.C. § 1 (defining ‘person’ to include ‘corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals’).”).

<sup>5</sup> *See, e.g.*, *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (construing RFRA); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012) (construing Free Exercise clause); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (Free Exercise).

<sup>6</sup> *See* Amicus Curie Brief of Corporate and Criminal Law Professors for Petitioners at 26-27, *Sebelius v. Hobby Lobby*, 134 S. Ct. 678 (2013) (No. 13-354) (“If this Court were to accept Hobby Lobby’s and Conestoga’s arguments, what would prevent a corporation from invoking religion essentially at will in order to obtain exemptions from generally applicable laws and regulations that the corporation finds too costly? [ . . . ] And, if federal courts are not prepared to entangle themselves in such questions, will boards of directors be duty-bound to shareholders to adopt some form of religious identity, so as to exempt the corporation from the greatest number of generally applicable laws and regulations?”); *see also*, Ruth Marcus, *Supreme Court Hobby Lobby Ruling Could Start a ‘Parade of Horribles’*, WASH. POST (Mar. 25, 2014) (discussing how “where to draw the line on corporate personhood is just one the slippery slopes these cases pose,” and predicting that the “minute the court opens this door, there are going to be a lot of corporate fists waving, and a lot of bruised

Regardless of these impressions, there is a question left on the table—is *Hobby Lobby* also a land use case? Justice Alito, the author of the majority opinion, certainly implied so. In reaching the conclusion that for-profit corporations were entitled to RFRA relief, Alito referred to its companion, the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”),<sup>7</sup> which amended RFRA’s definition of “exercise of religion” to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>8</sup> In the eyes of the majority, this more flexible standard signaled “an obvious effort to effect a complete separation from First Amendment case law” in mediating between religious liberties and government, such that certain for-profits were entitled to religious protections.<sup>9</sup> Significantly, the Court also recognized that RLUIPA “imposes the same general test as RFRA but on a more limited category of governmental actions,”<sup>10</sup> implying that the only substantial difference between the two statutes is their target, and not their beneficiaries. In this way, the Court left the possibility of RLUIPA claims wide open for business owners who faced similar religious constraints in the context of land use regulations.

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[http://www.washingtonpost.com/opinions/ruth-marcus-supreme-court-hobby-lobby-ruling-could-start-a-parade-of-horribles/2014/03/25/e803675a-b45e-11e3-8cb6-284052554d74\\_story.html](http://www.washingtonpost.com/opinions/ruth-marcus-supreme-court-hobby-lobby-ruling-could-start-a-parade-of-horribles/2014/03/25/e803675a-b45e-11e3-8cb6-284052554d74_story.html).

<sup>7</sup> 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.* (2000).

<sup>8</sup> *Hobby Lobby*, 134 S. Ct. at 2761. It should be noted that RFRA not only adopted RLUIPA’s definition, but more directly links the two statutes by stating “the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title [‘RLUIPA’].”

<sup>9</sup> *Id.* Specifically, Justice Alito noted that “Congress deleted the reference to the First Amendment and defined the ‘exercise of religion’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’ §2000cc-5(7)(A). And Congress mandated that this concept ‘be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.’ §2000cc- 3(g).” *Id.*

<sup>10</sup> *Id.* at 2761-62.

Oddly enough, Justice Alito failed to discuss zoning in construing these statutes together, preferring instead to discuss the situation of institutionalized persons under RLUIPA.<sup>11</sup> This may have simply been a matter of responding to the likely criticism that this case would bring on a Biblical flood of for-profit RFRA claims—by invoking the ability of judges to ferret out the insincere RLUIPA requests of inmates (a group with the “propensity . . . to assert claims of dubious sincerity”), Justice Alito argued that it stood to reason that judges could also handle insincere RFRA claims brought by for-profits.<sup>12</sup> In any event, the majority’s reading tends to speak for itself—by strengthening the connective tissue between the religious exercise provisions of these statutes, it is largely irrelevant that Justice Alito did not mention land use. This fact was not lost on other members of the Court.

Justice Ginsburg, in a dissenting opinion, argued that the majority gave a “passing strange” reading of RLUIPA and RFRA, for their account would inevitably “permit commercial enterprises to challenge zoning and other land-use regulations under RLUIPA . . . deeply intrud[ing] on local prerogatives.”<sup>13</sup> Owing to the kinship

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<sup>11</sup> As Professor Stephen R. Miller recently noted:

The potential effect of *Hobby Lobby* on land use claims is ironic because the majority explicitly avoided discussing that RLUIPA covers land use, and yet, *Hobby Lobby* may turn out to be a major land use case. Whenever referencing RLUIPA, Alito’s majority opinion only mentioned institutionalized persons (see excerpts below). What is the import of that? I am still trying to figure that out, but I thought I would raise the issue here. Stephen R. Miller, *Hobby Lobby’s “Passing Strange” Interpretation of RLUIPA: An Unlikely, but Potentially Dramatic, Impact on Land Use Law?*, LAND USE PROF BLOG (July 1, 2014), [http://lawprofessors.typepad.com/land\\_use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chillin.html](http://lawprofessors.typepad.com/land_use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chillin.html).

<sup>12</sup> See *Hobby Lobby*, 134 S. Ct. at 2774.

<sup>13</sup> *Id.* (Ginsburg, J., dissenting) at 2794 n.12.

between the two statutes,<sup>14</sup> outlining the consequences for RLUIPA litigation in order to narrow the reading of RFRA is reasonable, though ultimately not a winner against Justice Alito's generous reading of legislative intent.<sup>15</sup>

Fearing this scenario, that for-profits could easily take advantage of an expanded reading of "person" under RFRA to craft RLUIPA challenges to local zoning, the National League of Cities ("NLC")<sup>16</sup> filed an *amicus curiae* brief. Lobbying for a narrower reading of "person" for RFRA claims, they cited concerns that for-profit businesses would use a permissive reading of this statute to claim rights under RLUIPA, causing "skewed market incentives, expansion of protected activity, and interference with the administration of local land use ordinances."<sup>17</sup> In particular, they cautioned that "[a]llowing for-profit corporations to invoke RLUIPA would likely lead to a sharp increase in cases in which the government must make land use decisions with the possibility of RLUIPA litigation looming in the background."<sup>18</sup>

Others have voiced similar concerns and predictions in the wake of the *Hobby Lobby* decision. Daniel Dalton, a veteran RLUIPA

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<sup>14</sup> See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) (Noting that "RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens," and its relationship to RFRA).

<sup>15</sup> *Hobby Lobby*, 134 S. Ct. at 2767 ("As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.").

<sup>16</sup> For more on this organization, see *About NLC*, NATIONAL LEAGUE OF CITIES ("The National League of Cities (NLC) is dedicated to helping city leaders build better communities. Working in partnership with the 49 state municipal leagues, NLC serves as a resource to and an advocate for the more than 19,000 cities, villages and towns it represents."), <http://www.nlc.org/about-nlc>.

<sup>17</sup> Brief for National League of Cities et al. as Amici Curiae Supporting Petitioners at 31, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), available at <http://www.becketfund.org/wp-content/uploads/2014/01/13-35413-356bsacNationalLeagueofCiti.pdf>.

<sup>18</sup> *Id.* at 29. This issue is furthered explored in Part I, *infra*.

litigator, has remarked that a “close reading of Justice Alito’s discussion on RLUIPA and RFRA can logically be taken as leaving the door open to RLUIPA claims by for-profit companies as long as the ‘exercise of religion’ is sincere,” while “the possibility of for-profit companies taking advantage of RLUIPA land use protections could have massive implications on land use law.”<sup>19</sup>

The other side of the table has also expressed wariness. The Texas Municipal League (“TML”) recently acknowledged that “[w]hile this case does not deal with a core city issue, its holding has implications for cities because of RFRA’s sister statute, [RLUIPA].”<sup>20</sup> On this point, the TML noted that though “[u]p to this point, RLUIPA typically allowed only a religious congregation to challenge a city’s land use regulations. After Hobby Lobby, some fear that for-profit corporations may now claim religious protections from municipal land use regulations.”<sup>21</sup> In similar fashion, a recent edition of the Zoning and Planning Law Report explains:

In the wake of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, some have questioned whether privately held corporations can now bring RLUIPA claims. Hobby Lobby found that such corporations were “persons” and could sue under RLUIPA’s sister statute, the Religious Freedom Restoration Act. [ . . . ] What should municipalities do if a privately held corporation asserts that it is protected by RLUIPA? Consider, for example, the frozen yogurt establishment sweetFrog.<sup>TM</sup> According to the company’s

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<sup>19</sup> Daniel P. Dalton, *RLUIPA, Land Use, and the Hobby Lobby Decision*, DALTON-TOMICH (Aug. 13, 2014), [http://www.daltontomich.com/rluiipa\\_land\\_use\\_and\\_the\\_hobby\\_lobby\\_decision/](http://www.daltontomich.com/rluiipa_land_use_and_the_hobby_lobby_decision/).

<sup>20</sup> *How the Hobby Lobby Decision Could Affect Cities*, TEXAS MUNICIPAL LEAGUE, [http://www.tml.org/legis\\_updates/how-the-hobby-lobby-decision-could-affect-cities](http://www.tml.org/legis_updates/how-the-hobby-lobby-decision-could-affect-cities).

<sup>21</sup> *Id.*

website, sweetFrog premium frozen yogurt strives to ‘create the best frozen yogurt experience you’ve ever had!’ It adds that ‘[t]he F.R.O.G. in sweetFrog stands for Fully Rely On God.’ What happens if sweetFrog seeks zoning approval to operate at a certain location it asserts is of religious significance? Does RLUIPA apply? Out of an abundance of caution, municipalities may now wish to proceed as though the statute does apply.<sup>22</sup>

The prospect of *Hobby Lobby* as a land use case, perhaps because it does not complete the media-friendly trinity of “religion, sex, and corporations,”<sup>23</sup> has received little attention. Yet it invites a new level of significance to this decision—if for-profit corporations can now effectively challenge local zoning that incidentally burdens the religious exercise of their owners, city planners and zoning boards ignore this case at their peril. As it stands, there is already a RLUIPA land-use case wending its way through the Ninth Circuit Court of Appeals that has *Hobby Lobby* on its lips.<sup>24</sup>

To rouse the claimant and local administrative agency alike, this paper unpacks some of the more basic ramifications of *Hobby Lobby* to RLUIPA litigation. Part I introduces the subject of religious accommodations in zoning, RLUIPA’s impact on their administration, and the significance of allowing certain for-profits to bring such claims. Part II synthesizes *Hobby Lobby* with an eye towards its likeliest beneficiaries in RLUIPA litigation. Part III

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<sup>22</sup> 37 No. 11 ZONING AND PLANNING LAW REPORTS NL 1 (emphasis added).

<sup>23</sup> See Eric Rassbach, *Is Hobby Lobby Really a Brave New World? Litigation Truths About Religious Exercise by For-Profit Corporations*, 42 HASTINGS CONST. L.Q. 625, 630 (2015) (speculating on the different treatment by media and legal scholars of Hobby Lobby and other religious exercise cases).

<sup>24</sup> Brief for Appellant, Harbor Missionary Church v. San Buenaventura, et al., (No. 14-56137) (citing *Hobby Lobby* for a more expansive reading of “substantial burden” and a more rigorous treatment of the “least restrictive” means test under RLUIPA), available at <https://law.stanford.edu/wp-content/uploads/2015/06/Opening-Brief-1.pdf>.

concludes with a discussion of how these claims could be received, and provides hypothetical cases to illustrate the ready application of *Hobby Lobby* here.

These are certainly not all the concerns, nor does this paper stray into all the nooks-and-crannies of RLUIPA. Nevertheless, this exercise should provide a quick chart for those who had a nagging sense that *Hobby Lobby* was not so boring after all.

### I. RELIGIOUS ACCOMMODATIONS IN LAND USE BEFORE & AFTER RLUIPA

The police power of the state is not limited to eliminating nuisances, haphazardly in a whack-a-mole fashion. It also encourages activities that enrich and raise the conditions of daily life.<sup>25</sup> Thus zoning, as a tool of the police power, may privilege certain land uses while putting a premium on others.<sup>26</sup>

Regulatory tools such as the Conditional Use Permit can be regarded as the language by which a locality speaks its preferences, and navigating these stated values is the life of the land-use attorney.<sup>27</sup> Or as Professor Marci Hamilton aptly puts it, “[l]and use

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<sup>25</sup> Justice Douglas, noted this dual role of zoning in the context of protecting the makeup of single-family housing districts, remarking that “[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make a sanctuary for people.” *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

<sup>26</sup> *Solid Waste Agency v. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1944) (“[R]egulation of land use [is] a function traditionally performed by local governments.”)).

<sup>27</sup> See, e.g., Roderick M. Hills, *Koontz’s Unintelligible Takings Rule: Can Remedial Equivocation save the Court from a Doctrinal Quagmire?*, PRAWFSBLAWG (June 25, 2013) (noting “routine conditions on land-use permits (e.g., obligations to build affordable housing, finance public plazas, bank wetlands, hire local folks for construction jobs, improve subway stops, etc.) that are the routine currency of conditional map amendments, conditional use permits, variances, PUD approvals, and the like”), <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takin>



law is one of the key ways that communities come together to set priorities, to establish their character, and to meet fiscal, aesthetic, and lifestyle needs.”<sup>28</sup> So long as these tools are not wielded in an arbitrary or malicious fashion, there is wisdom in allowing the regulatory shoe to fit the size and scale of local needs, lest homeowners vote with their feet.<sup>29</sup>

Some land uses enjoy better mileage. Religious institutions have long been regarded as beneficial to their surroundings.<sup>30</sup> Their need to locate in the vicinity of their adherents is often respected, allowing buildings of many shapes and sizes to enter residential areas that would otherwise exclude them.<sup>31</sup> However, this does not amount to a free pass, as the practical effects of a particular religious project have been weighed against this presumption, albeit with some solicitude to their unique claims of religious right.<sup>32</sup>

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<sup>28</sup> Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335 (2003).

<sup>29</sup> For a fascinating discussion of the heightened sensitivity of homeowners to local zoning and other aspects of government, see generally, WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2005).

<sup>30</sup> See, e.g., *State ex. rel. Anshe Chesed Congregation v. Bruggemeier*, 115 N.E.2d 65, 69 (Ohio Ct. App. 1953) (remarking that the tax exemptions given to religious institutions acted as “a public recognition of the importance of these voluntary organizations to the well being of our community life.”)

<sup>31</sup> See Terry Rice, *Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses*, 8 PACE L. REV. 1 (1988); NORMAN WILLIAMS, *AMERICAN LAND PLANNING LAW* § 77.01 (1985) (“Quite apart from tradition and aesthetics, no facility is more appropriately located in residential districts than a church from a viewpoint of its own effective functioning.”).

<sup>32</sup> See Hamilton, *supra* note 28, at 337 (“Despite the variety, there is no state that gives religious landowners complete carte blanche under land use laws. Every state applies at least some elements of its land use law to religious landowners, whether it is zoning or use restrictions, or both.”). For a discussion of this balance between zoning prerogatives and constitutional rights, see the discussion in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (“The power of local governments to zone

Thus, prior to RLUIPA, local authorities regulated religious land uses under much the same framework as secular ones,<sup>33</sup> citing traditional concerns over the effect such projects may have on the public's health, safety, welfare or morals.<sup>34</sup> Their "presumed beneficial effect on the community," could be "rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like."<sup>35</sup> For example, in *Messiah Baptist Church v. County of Jefferson*, the court upheld the denial of special permit for a church to build in an agricultural zone on the basis of issues of access, erosion, and the lack of fire protection—emphasizing that a "church has no constitutional right to be free

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and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.' [ . . . ] Accordingly, it is subject to judicial review; and is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.") (internal citations omitted).

<sup>33</sup> Hamilton, *supra* note 28, at 341, offers an excellent summary of the pre-RLUIPA challenges, describing how "[t]he federal courts have jurisdiction to hear federal constitutional challenges to land use laws, with that review traditionally taking the route of rationality review either under the Equal Protection Clause or the Due Process Clause. Challenges under the Free Exercise Clause are governed by *Employment Division v. Smith*, which does not speak directly to land use (nor does any other free exercise case), but institutes the rule that generally applicable laws that are applied neutrally and not motivated by animus are valid. Under all three of these theories, in the absence of purposeful discrimination, state and local governments are given wide latitude to serve their communities and to achieve the common good through innovative land use planning. Today, the First Amendment effectively only offers protection against discriminatory land use regulations. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)."

<sup>34</sup> See, e.g., *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 594-95, 503 N.E.2d 509, 514-15 (1986) (rejecting "any argument that 'appropriate restrictions may never be imposed with respect to a church and school and accessory uses'" or that "'under no circumstances may [such uses] ever be excluded from designated areas'" and that religious land uses would not be permitted that "endanger[ed] the public's health, safety, welfare or morals").

<sup>35</sup> *Id.*; see also *Kali Bari Temple v. Board of Adjustment of Tp. of Readington*, 271 N.J. Super. 241, 638 A.2d 839 (App. Div. 1994).

from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases.”<sup>36</sup>

Some have argued that this regime effected a bias against unpopular religions and placed undue burdens on the creation of new churches,<sup>37</sup> while others favored this framework as a modest check against the influence of religion over the zoning process.<sup>38</sup> Though inconclusive, a recent study of the decisions of a Board of Zoning Appeals in New Haven, Connecticut, found little discrimination between secular and religious applicants for variances and exemptions, or between mainstream and minority religions.<sup>39</sup>

If there is hostility, or at least ambivalence to the zoning requests of religious organizations, it likely tracks the changing nature and intensiveness of religious land uses. The bucolic ideal of the small “house of worship” with drowsy sermons has long been overshadowed by megachurches that have the character and effect of stadiums hosting weekly rock-concerts.<sup>40</sup> Churches and other religious institutions now offer a variety of auxiliary services

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<sup>36</sup> *Messiah Baptist Church v. Jefferson*, 859 F.2d 820, 822, 826 (10th Cir. 1988) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

<sup>37</sup> See Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999).

<sup>38</sup> See Hamilton, *supra* note 28; see also, Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 859 (2007) (discussing disputed effects of this system).

<sup>39</sup> Clowney, *supra* note 38, at 861-62 (the author also argued that New Haven was ideal for a study of this type, noting among other things that the “laws and demographics of the city render it an excellent test case for scholars concerned about the fate of churches in zoning disputes. Like many medium-sized university towns, New Haven is full of the educated elites who are often accused of being ‘hostile to religion and to churches.’ The laws of Connecticut also make no special allowance for religious land uses in zoning disputes. Accordingly, if a general bias against churches exists, we should expect to find it in the New Haven city records”).

<sup>40</sup> See Haya El Nasser, *Megachurches Clash with Critics Next Door*, USA TODAY (Sept. 23, 2002) (discussing transformation of religious land uses and tensions between neighbors and mega-churches), <http://www.freerepublic.com/focus/news/757429/posts>.

outside of traditional worship, such as day-care, insurance, dining, and even banking.<sup>41</sup> In this regard, it is becoming abundantly clear that not all religious land uses are the same, and the line between the commercial and religious spheres is sometimes blurry, if not entirely meaningless.<sup>42</sup>

Reflecting the modern diversity of religious land uses, consider LifeAustin church, which recently opened an amphitheatre on its fifty-three acre plot. Among other features, the amphitheatre hosts Christian concerts and Disney events, with seating for over a thousand.<sup>43</sup> Advertised as a place for a spiritual “conversation” with those uncomfortable with a traditional church format, this spirited conversation has nonetheless generated hundreds of noise complaints from area residents. It is also the subject of petitions to the Austin Board of Adjustment to change the zoning over the site from “religious assembly” to a Rural Residential—Neighborhood Plan district.<sup>44</sup>

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<sup>41</sup> Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207 (2006)

<sup>42</sup> See the discussion in Hamilton, *supra* note 28, at 340 (“[T]his trend has culminated in a move toward all-inclusive religious communities, from megachurches that are on the scale of a sizable shopping mall to planned communities that encompass not just a house of worship, but many social services and even private homes. This is a trend toward buildings that have greater negative secondary effects on neighbors, whether residential or commercial, and that raises issues properly and regularly considered by land use authorities in creating Master Plans or in the day-to-day determination of permit and variance requests.”).

<sup>43</sup> An upcoming concert offers a range of tickets, including a “platinum” offering for a hundred dollars that “[i]ncludes a pre-show photo opportunity with Sandi, best seats, Q&A with Sandi, early entry and latest CD.” Sandi Patty - Forever Grateful - The Farewell Tour, LIFE AUSTIN AMPHITHEATRE, <http://www.lifeaustinamp.com/sandi-patty-forever-grateful-the-farewell-tour/>.

<sup>44</sup> Kelli Weldon, *Controversial LifeAustin Amphitheatre Decision Postponed*, COMMUNITY IMPACT NEWSPAPER (Dec. 10, 2015), <http://communityimpact.com/2015/12/10/controversial-life-austin-amphitheatre-decision-postponed/>; Amanda Brandeis, *Fight Over Church Noise Continues at Austin City Hall*, KXAN (Dec. 9, 2015),

Needless to say, the growing friction between neighbors and religious groups has complicated the zoning process—one member of the Board of Adjustment even went so far as to say that the debate over the proper zoning of the amphitheatre presented “the hardest case, the most convoluted case, the most confusing case I’ve ever seen.”<sup>45</sup> Despite these noteworthy changes in the makeup of religious land uses, Congress believed that it would take a federal statute to adequately protect free exercise,<sup>46</sup> and passed RLUIPA to subject land-use decisions affecting religious and affiliated groups to strict scrutiny.<sup>47</sup>

Like RFRA, after a religious group demonstrates a “substantial burden” on their religious exercise, it is then the regulator’s burden to show that the decision was the “least restrictive means” of achieving a “compelling governmental interest.”<sup>48</sup> Writing recently on this point of “least restrictive means,” and citing *Hobby Lobby*,

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<http://kxan.com/2015/12/09/fight-over-church-noise-continues-at-austin-city-hall/>.

<sup>45</sup> Weldon, *supra* note 44.

<sup>46</sup> Congressional record indicates that RLUIPA was “designed to protect the free exercise of religion from unnecessary governmental interference” and “to protect one of the most fundamental aspects of religious freedom, the right to gather and worship.” 46 Cong. Rec. H7190, 7190-1 (2000). Congress also cited concerns that reasons such as “traffic, aesthetics, or uses not consistent with the city’s land use plan” were pretexts to exclude religious uses. 146 Cong. Rec. S7774, 7774 (2000).

<sup>47</sup> 42 U.S.C. § 2000cc(a) (2001).

<sup>48</sup> See *Id.* § 2000cc(a)(1)(A-B) (2001); Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 193 (2001). RLUIPA adopts the definition of “substantial burden” from traditional free-exercise jurisprudence. See 146 Cong. Rec. S7774-01, S7776. For a relatively simple articulation, see *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (finding that a “substantial burden” exists where the state “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs”). For an example of the “least restrictive means” test being satisfied, consider, *The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 516 (D.N.J. 2005), *judgment aff’d in part, vacated in part*, 510 F.3d 253 (3d Cir. 2007), where the court found that the prohibition of religious uses within a limited commercial district was the least restrictive means of creating a redevelopment zone.

Justice Alito noted that RLUIPA “may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”<sup>49</sup> This feature could make the prospect of for-profit RLUIPA claims particularly interesting, given the different resources between the federal agencies described in *Hobby Lobby* and the local municipalities that make land use decisions.

Most relevant here, RLUIPA can be invoked where this “substantial burden” results from “the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved.”<sup>50</sup> Variances and special permits are common examples of “individualized assessments.”<sup>51</sup>

With its expansive definition of “religious exercise,”<sup>52</sup> RLUIPA also presents local land use regulators with the risk of “hampering a personal ideology that it could not have known existed.”<sup>53</sup> As perhaps an obvious limitation, courts have implied that this exercise be undertaken with a “sincerely held” religious belief.<sup>54</sup>

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<sup>49</sup> See *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (citing 42 U.S.C. § 2000cc-3(c) and *Hobby Lobby*, 134 S. Ct. 2761-62) (internal citations omitted).

<sup>50</sup> 42 U.S.C. § 2000cc(a)(2)(c) (emphasis added).

<sup>51</sup> See, e.g., *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734 (Mich. 2007) (holding that general use rezoning was not an individualized assessment).

<sup>52</sup> Defined as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C.A. § 2000cc-5(7)(A). RLUIPA also provides that “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” *Id.* 2000cc-5(7)(B).

<sup>53</sup> Stuart Meck, *Religious Land Use and Institutionalized Persons Act*, ZONING NEWS, AMERICAN PLANNING ASSOCIATION (Jan. 2001); see also, Walsh, *supra* note 48, at 193.

<sup>54</sup> *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 65 Fed. R. Serv. 3d 248 (10th Cir. 2006); *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 259 Mich. App. 315, 675 N.W.2d 271 (2003); *Corporation of Presiding Bishop of*

Activities that have been considered “religious exercise” under RLUIPA include a temporary encampment for homeless persons,<sup>55</sup> a community center with non-religious services,<sup>56</sup> and the classroom expansion of a religious school<sup>57</sup>—while an apartment complex,<sup>58</sup> and a cemetery<sup>59</sup> have not. Of particular interest to the project of this paper—in the case dealing with the apartment complex, the court upheld the denial of the requested rezoning partly on the reasoning that “[g]enerally, the building of an apartment complex would be considered a *commercial* exercise, not a *religious* exercise.”<sup>60</sup> Yet, after *Hobby Lobby* and its expansive reading of “person[s]” who have an interest in free religious exercise to include big-box for-profit corporations, how could this distinction still possibly hold water? (For further discussion of this issue, see *infra* Part II.)

The combination of all of these features of RLUIPA—its capaciousness, the burden-shifting,<sup>61</sup> and the prospect of a costly

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Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 86 P.3d 1140, 1147 (2004), *decision aff'd and remanded*, 111 P.3d 1123 (2005); Marria v. Broadus, 200 F. Supp. 2d 280 (S.D.N.Y. 2002).

<sup>55</sup> City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406, 411 (2009).

<sup>56</sup> World Outreach Conference Center v. City of Chicago, 591 F.3d 531 (7th Cir. 2009).

<sup>57</sup> Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 351 (2d Cir. 2007); Living Water Church of God v. Charter Tp. of Meridian, 384 F. Supp. 2d 1123 (W.D. Mich. 2005), *judgment rev'd and remanded on other grounds*, 258 Fed. Appx. 729 (6th Cir. 2007).

<sup>58</sup> Greater Bible Way, 733 N.W.2d at 734.

<sup>59</sup> St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007).

<sup>60</sup> Greater Bible Way, 733 N.W.2d at 746 (emphasis added). Although the court also held that the requested rezoning was not an “individualized assessment,” and thus RLUIPA could not apply, it addressed this point of sincerity *arguendo*.

<sup>61</sup> See Alan C. Weinstein, *How to Avoid A “Holy War” – Dealing With Potential RLUIPA Claims*, 60 PLANNING & ENV. L. 3, 3 (2008) (“Legally, RLUIPA claims occupy a middle ground between challenges to land use regulations in which government is presumed to have acted lawfully and challenges in which government does not have the benefit of that presumption.”).

federal lawsuit—has led many local zoning authorities to capitulation rather than serious consideration of the merits of requests for religious accommodation.<sup>62</sup> For example, citing a “lose-lose proposition” caused by a potential RLUIPA lawsuit, a zoning board recently caved to a church’s request to move into a commercial district, despite some grumbling that this would not be in the public interest.<sup>63</sup>

This is the stage, and a glimpse at the stakes, should for-profits with intensive uses on the order of a megachurch make RLUIPA claims. There is good reason to believe that they have every opportunity to do so, and that the legal analysis of their claims would be largely the same as traditional religious institutions. Following *Hobby Lobby*, Justice Alito has again indicated that RLUIPA should be read as the “sister statute” to RFRA, and that both were enacted “in order to provide very broad protection for religious liberty.”<sup>64</sup> The Court in *Holt v. Hobbs* also construed the “compelling interest” and “least restrictive means” tests in a similar fashion.<sup>65</sup> Therefore, all that remains is finding the right plaintiffs— a topic taken up in the following section.

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<sup>62</sup> *Id.* (“Local government reactions to potential RLUIPA claims have run the gamut from immediate unconditional surrender at a church’s mere mention of RLUIPA, to good-faith efforts at compromise, to willingness, perhaps even eagerness, to litigate the case all the way to the U.S. Supreme Court.”).

<sup>63</sup> Nick Reid, *Pembroke Zoning Board Reverses Course to Allow Next Level Church in Prohibited Zone*, CONCORD MONITOR (Nov. 25, 2015), <http://www.concordmonitor.com/news/19668909-95/pembroke-zoning-board-reverses-course-to-allow-next-level-church-in-prohibited-zone>.

<sup>64</sup> *Hobbs*, 135 S. Ct. at 859 (citing *Hobby Lobby*) (internal citations omitted).

<sup>65</sup> *See id.* at 863 (“But RLUIPA, like RFRA, contemplates a ‘more focused’ inquiry and ‘requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.’ *Hobby Lobby*, 134 S. Ct. at 2779 (quoting *O Centro*, 546 U.S. at 430-431 (quoting § 2000bb-1(b))). RLUIPA requires us to ‘scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants’ and ‘to look to the marginal interest in enforcing’ the



## II. FOR-PROFIT RLUIPA CLAIMANTS AFTER *HOBBY LOBBY*

The obvious beneficiaries of an expanded reading of RLUIPA after *Hobby Lobby* would be businesses modeled after the Plaintiffs in the original case—Hobby Lobby Inc., Mardel, and Conestoga Wood Specialties Corp.

All of these businesses are organized as for-profit corporations, have chains operating nationwide, and employ thousands. Conestoga manufactures wooden cabinets and components; Hobby Lobby offers arts-and-crafts materials while its affiliate Mardel sells Christian books.<sup>66</sup> With the exception of Mardel, these companies have relatively subdued religious themes, which left Justice Alito to elaborate the close alignment between the Plaintiff's faith and the regulation of their business practices under the Affordable Care Act. Fitting into the grooves of this discussion should offer RLUIPA protection against similarly burdensome restrictions on construction and land use.

With Conestoga, the majority opinion noted that the Hahns, a Mennonite family, were “sole owners”—they controlled the board membership, had all its voting shares, and a family member acted as president and CEO.<sup>67</sup> The Court also made similar findings for Hobby Lobby.<sup>68</sup> The fact that these corporations were closely-held among family members is understated, yet could be rather important—the relative stability of this feature may have allowed Justice Alito to sidestep the abstract task of determining whether religious exemptions given to for-profit corporations were subject to the changes and whims of different board membership.

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challenged government action in that particular context. *Hobby Lobby*, 134 S. Ct. at 2779”) (quoting *O Centro*, 546 U.S. at 431; alteration in original).”).

<sup>66</sup> A member of the Green family founded and operates Mardel, which consists of 35 Christian bookstores and employs close to 400 people. *See Hobby Lobby*, 134 S. Ct. at 2765.

<sup>67</sup> *Id.* at 2764.

<sup>68</sup> *Id.* at 2765.

For example, if one of the Hahns had a sudden change of conviction or interpretation of the Mennonite faith and decided that the contraception required by the federal government was no longer a burden on their conscience, would Conestoga be required to provide such care in their employee benefits, or would a majority of the board members' belief sustain the exemption? This is the sort of angels-on-the-head-of-a-pin work that federal judges are loathe to undertake—Justice Sotomayor seized on this issue during oral argument, wondering how one could determine when a corporation is guided by a certain belief—“Who says it? The majority of shareholders? The corporate officers?”—but ultimately conceded that in the immediate case, at least, the Court was faced with “great plaintiffs.”<sup>69</sup>

These great plaintiffs also explicitly operated on religious principles. The Hahns professed to run their business “in accordance with their religious beliefs and moral principles,” while their “Vision and Values” statement promised that Conestoga operated to “ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage.”<sup>70</sup>

The owners of Hobby Lobby, the Greens, had a similar statement of purpose, with the additional feature that “[e]ach family member ha[d] signed a pledge to run the businesses in accordance with the family’s religious beliefs and to use the family assets to support Christian ministries.”<sup>71</sup> The Greens also closed their businesses on Sunday, donated to Christian causes, and avoided otherwise profitable ventures on the basis of these beliefs, giving substance to their corporate credo.<sup>72</sup> Most relevant to the

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<sup>69</sup> Transcript of Oral Argument at 18-19, *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014) (No. 13-354), *available* at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-354\\_5436.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf).

<sup>70</sup> *Hobby Lobby*, 134 S. Ct. at 2764-65.

<sup>71</sup> *Id.* at 2766.

<sup>72</sup> *Id.*

immediate litigation, the Court also took notice of Conestoga's board-adopted "Statement on the Sanctity of Human Life" that laid out the Hahns' belief that human life began at conception, and that their involvement with the level of contraceptive care mandated by the federal government would be sinful.<sup>73</sup>

In sum, a corporation will most resemble the *Hobby Lobby* plaintiffs if it is a closely-held family business run with a discoverable religious purpose. This template provides a ready hook for the sincerity of an owner's religious objection to regulations that essentially only apply to their business. It is certainly helpful to make that connection clear by announcing specific beliefs, such as an objection to certain contraceptives, as part and parcel to corporate values. Even better, businesses that cater to religious needs should do very well as RLUIPA claimants, perhaps because of the straightforward sincerity of their claim that they have an active business in religion (see *infra* Part III).

Making a point of running a for-profit on religious principles may even be unnecessary to gain RFRA and RLUIPA protection. Justice Alito used a broad, purposive analysis to construe the definition of "person" under RFRA to include for-profit corporations, reasoning that a "corporation is simply a form of organization used by human beings to achieve desired ends," and thus "protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."<sup>74</sup>

If the occasion of a certain law or regulation presents an opportunity for religiously motivated action or non-action on the

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<sup>73</sup> *Id.* at 2765.

<sup>74</sup> *Id.* at 2768. Justice Alito also noted: "No known understanding of the term 'person' includes some but not all corporations. The term 'person' sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations." *Id.* at 2769.

part of business owners, this could very well suffice. With the Court's capacious reasoning in *Hobby Lobby*, it would be odd to suggest that only those for-profits that had the foresight to issue statements of religiosity could enjoy statutory protection. In this sense, *Hobby Lobby* could allow for an "as the urge takes you" styled RLUIPA claim by a for-profit, assuming that this company could reasonably allege the sincerity of their religious need for a particular land use.<sup>75</sup>

This breadth recalls the earlier "pass through" theory developed by the Ninth Circuit in *EEOC v. Townley Eng'g & Mfg. Co.*<sup>76</sup> In *Townley*, the court recognized that because a for-profit mining company may be "the instrument through and by which [its owners] express their religious beliefs," it could therefore assert their free exercise rights.<sup>77</sup> This reading—that for-profits may be an object or means to religion—also suggests *Hobby Lobby* stands for a more "integralist" view of religious exercise, where faith functions "not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life,"<sup>78</sup> and the growing phenomenon of spirituality infusing the workplace.<sup>79</sup>

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<sup>75</sup> Cf. Amicus Curie Brief of Corporate and Criminal Law Professors for Petitioners, *supra* note 6, at 27 ("[I]t is very easy to imagine how companies would react if this Court were to rule in favor of Hobby Lobby and Conestoga. [ . . . ] A company will adopt a board resolution asserting a religious belief inconsistent with whatever regulation they find obnoxious . . .").

<sup>76</sup> 859 F.2d 610 (9th Cir. 1988). *Townley*, a mining company, was faced with a religious discrimination claim under Title VII of the Civil Rights Act, 42 USC §2000e-2(a), after terminating an employee who refused to attend weekly prayer meetings.

<sup>77</sup> *Id.* at 619.

<sup>78</sup> See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 180, 180-82 (2014).

<sup>79</sup> Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 19-21 (2013); see also John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 538 n.268 (2002) (noting that

Despite tending toward navel gazing, all of this underscores the provocative implications of *Hobby Lobby*. It is not clear how far this case extends for potential RFRA and RLUIPA claimants – whether it only allows claims by for-profits that are *ex ante* organized on religious principles, or grants any manner of objection springing from the sensibilities of corporate owners. This will likely be parsed in time. For now, it should at least appear that there are ready claims to be made by family-owned businesses infused with a religious purpose.

### III. ANALYZING THE MERITS OF FOR-PROFIT RLUIPA CLAIMS

#### A. THE BIG-BOX RELIGIOUS FRANCHISE

At the moment, thirty-five percent of Fortune 500 companies are closely-held family businesses.<sup>80</sup> Some have overt religious values. Take for example, Chik-fil-a, which has a self-described purpose “[t]o glorify God by being a faithful steward of all that is entrusted to us and to have a positive influence on all who come into contact” with its operations.<sup>81</sup> Chik-fil-a also loses enormous sums of money (reportedly up to \$190 million) by closing its restaurants on Sunday,<sup>82</sup> bolstering the sincerity of the claim that it operates under religious principles. This section proceeds with a hypothetical scenario where Chik-fil-a or a similar franchise could allege a RLUIPA claim.

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“[a]s society becomes wealthier, the distinction between what many people do for a living and what they do to express themselves blurs”).

<sup>80</sup> *Family Business Facts*, CONWAY CENTER FOR FAMILY BUSINESS, <http://www.familybusinesscenter.com/resources/family-business-facts/>.

<sup>81</sup> *Who We Are*, CHIK-FIL-A (Aug. 15, 2012), <http://www.chick-fil-a.com/media/pdf/who-we-are.pdf>.

<sup>82</sup> See Tiffany Hsu, *Chik-Fil-A Money Machine: Cathy Brothers Are Billionaires*, L.A. TIMES (July 31, 2012), <http://articles.latimes.com/2012/jul/31/business/la-fi-mo-chickfila-cathy-billionaire-20120731>.

Assume that the company applies for a set of variances to build a mega-restaurant in a community it deems a good fit for its religious values, such as a commercial district near a quiet residential neighborhood with several Southern Baptist churches.<sup>83</sup> Chik-fil-a makes this request assuming that a number of Baptists will use the location for devotional activities, and as a way to commemorate the faith of its founder Truett Cathy. Therefore it asks to construct a two-story building and avoid setback requirements that might otherwise restrict its mixed-use facility. To give more force to this scenario, one could also imagine Chik-fil-a refining its outreach goals to emphasize spacious, more recreational restaurants for its customers to have thoughtful interactions, such as discussing their faith, holding prayer meetings, and bible study. Special significance could also be given to this particular location, such as unique ties to the Cathy family and the Southern Baptist tradition.

Despite these ambitions, the zoning board denies the variance request due to concerns that a facility on this scale could have an overly adverse impact on traffic and the local environment. And so it should – the board is entrusted to weigh such concerns against the needs of individual petitioners. Nonetheless, *Hobby Lobby* perhaps adds new considerations, and arguably, a sizeable thumb on this scale.

The expansive reading of “religious exercise” provided by RLUIPA and elaborated in *Hobby Lobby* should cover such a project. Building a business to size with an owners’ spiritual goals seems

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<sup>83</sup> See Truett Cathy, *Chick-fil-A Founder and Chairman Emeritus, Dies at Age 93*, INSIDE CHIK-FIL-A (Sep. 19, 2014), <http://inside.chick-fil-a.com/truett-cathy-chick-fil-a-founder-dies-at-93/> (discussing faith of the Chik-fil-a founder Truett Cathy, noting that “Cathy was a devout Southern Baptist who taught Sunday school to 13-year-old boys for more than 50 years. As an extension of the founder’s faith and the *clearest example of incorporating biblical principles into the workplace*, all Chick-fil-A restaurants – without exception – operate with a ‘Closed-on-Sunday’ policy”) (emphasis added).

like it would fall under the statute, as it is unimportant whether it is compelled by—

or central to—their system of religious belief.<sup>84</sup> The Cathy family aims to run a faith-based business and have a positive impact on their patrons and local communities.<sup>85</sup> This site also has unique significance to these goals. Therefore, Chik-fil-a could plausibly tie this zoning request with the owners' religious exercise—a denial of the former could hamper or “substantially burden” the latter.

A court may certainly question the depth of such burdens and whether they are sufficiently coercive. Unlike the plaintiffs in *Hobby Lobby*, which were confronted with a federal mandate and sizeable penalties for non-compliance, the regulatory patchwork of (relatively) low-stake zoning decisions across multiple jurisdictions might not reasonably pressure corporate behavior, and in turn, the religious exercise of individual owners. In light of these pragmatic concerns, a corporate franchise may need to allege an idiosyncratic need for zoning approval in a particular location. Though “a law that ‘operates so as to make the practice of . . . religious beliefs more expensive’ in the context of business activities imposes a burden on the exercise of religion,”<sup>86</sup> the ability to easily absorb the cost of relocating or accept diminished profits would likely caution against finding a substantial burden in ordinary cases.<sup>87</sup>

Ultimately, if a judge is amenable to the above reasoning, even a big-box franchise like Chik-fil-a could assert an RLUIPA claim. In

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<sup>84</sup> See 42 U.S.C.A. § 2000cc-5(7)(A).

<sup>85</sup> See *Who We Are*, *supra* note 81 (discussing Christian values and ongoing community outreach projects).

<sup>86</sup> *Hobby Lobby*, 134 S. Ct. at 2770 (internal citations omitted).

<sup>87</sup> *Cf. Id.* at 2779 (“Because the contraceptive mandate forces [the Hahns and Greens] to *pay an enormous sum of money*—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate *clearly imposes a substantial burden on those beliefs.*”) (emphasis added).

response, local governments would then be faced with demonstrating that this denial was the least restrictive means of accomplishing a compelling interest. Though it could again point to basic concerns over traffic congestion, noise, and the other staples of zoning—it may be difficult to distinguish the environmental impact of this particular Chik-fil-a facility from the similar or even more noxious land uses of churches (or God forbid, megachurches) that had won similar concessions or avoided regulation altogether.

This example should at least illustrate the additional work for regulators if *Hobby Lobby* is recognized as a land use decision. For now, these sorts of challenges could wait in the wings for a more straightforward application—the RLUIPA claims of small-business owners who perform a religious function in their community.

#### B. THE MOM-AND-POP RELIGIOUS SHOP

A far easier case could be made to extend the logic of *Hobby Lobby* to the RLUIPA claims of small “mom-and-pop” for-profits. Justice Alito telegraphed how his expanded reading of RFRA might apply in the context of RLUIPA claims by evoking the situation of Kosher and Halal slaughterhouses:

What about the implications of saying that no for-profit corporation can raise any sort of free exercise claim at all and nobody associated with the for-profit corporation can raise any sort of free exercise claim at all? Let me give you this example. According to the media, Denmark recently prohibited kosher and halal slaughter methods because they believe that they are inhumane. Now, suppose Congress enacted something like that here. What would the -- what would a corporation that is a kosher or halal



slaughterhouse do? They would simply -- they would have no recourse whatsoever.<sup>88</sup>

Justice Breyer built on this point by citing the situation of “five Jewish or Muslim butchers,” and how in his opinion, it did not matter if they “call themselves a corporation or whether they call themselves individuals” for the purposes of asserting a religious exercise claim against a general law.<sup>89</sup>

This case, discussed by the author of the majority opinion and a dissenting Justice, should provide a more frictionless extension of *Hobby Lobby* to RLUIPA. As such, a local business with an overt religious theme should feel comfortable under the reasoning of this case and the intuitions of Justices Alito and Breyer in oral argument.

Most directly, if a family-owned halal or kosher slaughterhouse sought a variance to build or expand its facilities, one could easily imagine the character of their RLUIPA claim after a denial.<sup>90</sup> The sincerity of the owner’s beliefs as well as the substantial burden on their religious exercise is fairly easy to allege—preventing easy access to such products, and restricting a livelihood preparing it, may pressure them to alter core practices. The ability of small businesses to relocate or absorb losses is far more limited than larger enterprises. This showing would then force a local government to demonstrate that the denial of such requests was the least restrictive means to a compelling interest. Such a task would

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<sup>88</sup> Transcript of Oral Argument at 78, *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014) (No. 13-354), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-354\\_5436.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf).

<sup>89</sup> See *Id.* at 80.

<sup>90</sup> Compare the recent denial of a variance to build a kosher meatpacking facility due to a variety of local environmental concerns. Keith Trout, *Controversial Meat Packing Project To Be Heard Thursday*, RGJ (Sep. 2, 2014), <http://www.rgj.com/story/news/local/mason-valley/2014/09/02/controversial-meat-packing-project-heard-thursday/14996621/>.

be more elaborate if a less noxious use was involved – for example, in the case of a local Christian bookstore<sup>91</sup> or coffee shop.<sup>92</sup>

Small businesses thus seem a likely avenue for extending *Hobby Lobby* to RLUIPA litigation. Religious values and commercial goals can often share close quarters in this format. Where the desire of business owners to adapt their land use becomes a religious imperative, RLUIPA should come into play. This is more clearly demonstrated in the situation of for-profits that cater to specific religious needs. In the end, being able to assert RLUIPA claims may create new pressures for zoning approval – a possibility only hinted at in the wake of *Hobby Lobby*. How the public interest could be meaningfully weighed against such claims is ripe for speculation. Increasingly, certain for-profits and religious institutions occupy similar territory.

#### CONCLUSION

*Hobby Lobby* has provoked much discussion. However, scarce attention has been given to its potential impact on RLUIPA litigation, particularly, the novel possibility of for-profit corporations asserting claims under this statute. There is little reason to suppose that Justice Alito’s opinion on the scope of RFRA would not similarly apply to RLUIPA. Therefore, closely-held businesses, from big-box franchises to mom-and-pop shops, may be able to invoke federal protection against zoning decisions that burden their owner’s religious exercise. How this complicates the balance of American federalism – by increasing federal interference with traditional state prerogatives over zoning, yet also generating

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<sup>91</sup> Recall Mardel from the original *Hobby Lobby* case.

<sup>92</sup> See, e.g., the example of Pascal’s Coffeehouse, which operates in conjunction with the Christian Study Center of Gainesville, Florida. About, PASCAL’S COFFEEHOUSE, <http://www.pascalcoffee.com/about.html>.

new dialogue on the scope of individual rights—should be discussed and revealed in time.